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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	Case No. 96-128

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COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL

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TABLE OF CONTENTS

SUMMARY

The Commission's focus on market-based rates for setting the value of a dial around call was affirmed by the Court. The Court did not require a detailed analysis of costs. It merely held that having relied on the similarity of the costs of a dial around call and the costs of a local coin call, the Commission had to assess the evidence of the relative costs of dial around and coin calls. The Commission is free, on the remand to exclude costs from its assessment of the value of a call. Further, any difference in costs that may exist for a particular category of payphone costs is insignificant when total costs are considered.

In any event, the Commission should use a market-based approach in setting the value of a dial around calls. Any error in setting the per call rate too high would be immediately apparent because of its divergence from the market surrogate, and corrective action could be taken. This avoids the highly subjective nature of cost allocations.

The Commission can and should consider a variety of market-based surrogates, in addition to local coin calls. These include 0+ commissions and sent-paid toll call pay station charges. 0- transfer rates are also relevant, even though they are not directly related to the cost of originating a call from a payphone.

Even if the Commission continues to use the local coin calling rate as the appropriate surrogate, no significant adjustments for cost differences are required. Because most payphone costs are fixed, it is inappropriate to allocate theses fixed costs from one

class of calls to another. The payphone provider must incur all these costs to provide any service.

The cost of coin calling capability should also be allocated across all calls since very few locations will sustain a coinless phone. Thus, without the coin mechanisms, there would be no payphone at all in the overwhelming preponderance of locations.

There are no major differences in the variable costs attributable to local coin calls and dial around calls. Commissions, usually at an across the board level, are paid on all classes of calls. As for network usage costs, APCC conducted a study of local usage rates in the ten largest LEC study areas across. The weighted average of usage costs is about three (3) cents ($.03) per call. Finally, APCC's experience in operating a clearinghouse to collect dial around compensation for some 200,000 IPPs for five years shows there are administrative, dispute resolution, error correction, etc. collection costs of about three (3) cents ($.03) per dial around call. When cash flow and other direct costs are included, these costs increase close to another two (2) cents ($.02) per call. These costs are likely to increase by another cent ($.01) per call as the increasing complexity of per call compensation and collecting from dozens of carriers make themselves felt. Thus, it is reasonable to attribute collection costs of five-six (5-6) cents ($.05-.06) to each call in a per call compensation environment. This is substantially higher than any reasonable estimate of coin collection costs.

Furthermore, the average per call cost supports a compensation rate that is higher than $.35 for both the interim and permanent rates. To validate the market surrogates discussed above, APCC retained a consultant to conduct a study of the costs of 46 reporting IPP providers who operate about 95,000 payphones in a wide variety of environments. The average cost per call for the companies surveyed is forty one (41) cents ($.41) per call. This is a lower limit on the zone of reasonableness for costs; because costs are fixed, if the level of compensation is set too far below the average cost of a call, payphones with less than the average number of calls will be driven out in contravention of the statutory mandate to promote the widespread deployment of payphones.

Turning to interim compensation, the Commission should not reduce interim compensation. If the Commission simply sets a permanent rate that does not vary in accordance with some market surrogate that rate should remain in effect during the interim as well. If, however, the permanent rate varies with some market rate (such as the current rate which varies with the local coin rate), the surrogate should simply control during the interim. That rate should not be less than thirty five (35) cents ($.35), the deregulated local coin rate.

As for interim flat rate compensation, the Commission should exercise its discretion to refrain from applying any rate reduction retroactively. The Commission must consider the equities in determining whether and how to apply rates retroactively. IPP providers were delayed four years becoming eligible for 800 subscriber compensation because of the Commission's legal error. The IXCs, in essence, had a "free ride" during those years. The IPPs have proceeded in good faith. Further, the IXCs have apparently already recouped much or all of any payphone compensation from end users. Thus, any reduction in per call compensation should not be applied retroactively.

If the Commission does, however, determine to apply a reduced rate retroactively, then it must apply it as well to the 1992-1996 period and compensate independent PSPs for 800 calls during that period. Section 276 is a legislative validation of independent PSPs' right to 800 subscriber compensation. There are readily available surrogates. The equities and the law require that independent PSPs be made whole.

Increases in compensation should be applied retroactively. Again, the equities compel the Commission to exercise its discretion to at least order retroactive compensation to the effective date of compensation in this proceeding.

As for 0+ compensation, the Commission should declare that all PSPs who were not compensated for interLATA 0+ calls on a contractual basis are eligible for compensation. The principle should apply to independent PSPs no less then to RBOCs.

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COMMENTS OF THE
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The American Public Communications Council ("APCC") submits the following comments in response to the Commission's Public Notice, DA 97-1673, released August 5, 1997, requesting comment on the remand issues in this proceeding arising from the court of appeals decision in Illinois Public Telecommunications Ass'n v. FCC, No. 96-1394, slip op. (D.C. Cir., July 1, 1997) ("IPTA").

I. DIAL-AROUND COMPENSATION LEVEL

A. The Commission Should Maintain Its Focus On Market-Based Rates

In reconsidering the "dial-around"[1] compensation issue on remand, the Commission should maintain its overall market-based approach to ensuring fair

[1] In these comments, APCC uses the term "dial-around" to refer to any call that meets the criteria for "default" compensation under the FCC's rules adopted in this proceeding, i.e., any completed call for which the PSP does not charge the end user, and (Footnote continued)

738262
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compensation of payphone service providers ("PSPs"). A detailed cost analysis is not mandated by the Court's decision. Moreover, a market-based approach is more likely to lead to rates that "fairly compensate" PSPs and that "promote competition among payphone service providers and the widespread deployment of payphone services". 47 U.S.C. § 276(b)(1), (1)(A).

1. The Court decision affirms a market-based approach and does not mandate analysis of costs

The Court specifically ***affirmed,*** over the challenges of state commissions and interexchange carriers ("IXCs"), the Commission's finding that the payphone marketplace is competitive and the Commission's reliance on market forces to set the level of compensation for local coin calls. IPTA at 12. The Court also did not disturb the Commission's finding that "dial-around" calling is one area where market forces do not operate freely. Under Section 226 of the Act, 47 U.S.C. § 226, PSPs have no choice but to allow "dial-around" calls from their payphones whether or not they are compensated. Consequently, the Commission must step in to establish a "default" rate. Payphone Order, ¶ 49. These findings are correct, were not disturbed by the Court, and need not be revisited.

(Footnote continued)
for which there is no compensation agreement between the PSP and the carrier. See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("Payphone Order"). Appendix E, § 64.1300. Thus, "dial-around" calls include, but are not necessarily limited to, "access code" calls and "subscriber 800" calls.

Further, the Court did *not* disapprove the use of market-based rates such as the local coin rate as benchmarks for setting compensation for calls subject to market-disabling regulation. All that was disapproved was the specific rationale enunciated by the Commission in implementing a particular market based approach. The Court noted that the FCC rested its decision to set dial-around compensation equal to the local coin rate on a determination that the *costs* of originating these calls are similar. The Court only ruled that, having undertaken to assess the respective costs of originating dial-around calls and local coin calls, the FCC could not simply disregard evidence that the costs of the two types of calls are not the same.

Having reversed the FCC solely on this narrow ground, the Court has left the FCC with several alternative approaches on remand. The Court did not in any way preclude the Commission, in resetting the default level of dial-around compensation, from continuing to rely on market-based surrogates such as the local coin rate. Further, the Commission is not precluded from considering other market-based surrogates, such as the level of commissions paid by carriers to payphone service providers for "0+" operator service calls routed to the carrier.

Moreover, the FCC is not required, on remand, to attempt to calculate an exact cost differential to be reflected in the dial-around rate. There are other reasons, apart from cost similarities, that justify the use of market rates as proxies in setting a dial-around compensation rate. Thus, the FCC could decide on remand that, since payphone costs are not easy to assign to categories of calls, it is appropriate to simply exclude costs from the calculus and base 800/access compensation solely on market price indicators.

Further, the record convincingly demonstrates that there are both positive and negative differences in costs attributable to coin calls and dial-around calls. Any difference in costs attributable to specific categories is minimal in relation to overall payphone costs.

In short, the Commission has wide latitude in addressing the compensation level on remand. As discussed below, APCC believes that, no matter which methodological alternative is selected, the current record evidence supports a rate that is close to, if not higher than, the 35 cent rate currently prescribed.

2. A market-based approach is superior to a cost-based approach for purposes of this proceeding

It is entirely appropriate for the FCC to base its analysis primarily on market price indicators, without attempting to analyze payphone costs in detail or allocate them to particular categories of calls. As discussed further below, there are no major differences in the amounts of costs that are properly attributable to various categories of calls. In addition, there are reasons for utilizing a market-based analysis that apply independently of any similarities or differences in the costs of calls.[2]

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[2] Courts have repeatedly approved the use of market proxies for rate-setting purposes. See, e.g., Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir. 1982) (upholding the Copyright Royalty Tribunal's decision to raise the compulsory license fee for jukeboxes from $8 per box to $50 per box, based on "marketplace analogies"). Even in the context of "just and reasonable" ratesetting for common carriers, courts have repeatedly endorsed comparable rate analogies as appropriate ratemaking devices. See, e.g., San Antonio v. United States, 631 F.2d 831, 836-37 (D.C. Cir. 1980), clarified, 655 F.2d 1341 (D.C. Cir. 1981); Burlington

(Footnote continued)

First, by relying on market surrogates, the FCC can be more confident that if it sets a dial-around price level that is inappropriately high, it will be able to discover and correct its mistake. Indeed, the market itself will demonstrate the FCC's mistake. More payphone providers will enter the market, and more payphones will be deployed. As the supply of payphones expands, more payphones will be competing for the same group of consumers. As a result, there will be a decrease in the price of calls -- i.e., coin calls and 0+ commissions -- that are set directly by the market. The decline in these market indicators will prompt a resetting of the dial-around rate -- either automatically, if the FCC ties the dial-around rate directly to a market-based rate, or as a result of regulatory action, if the FCC sets the rate itself based on a composite of market price indicators.[3]

Thus, in light of the competitiveness of the overall payphone market, there is no need for the FCC to conduct a painstaking costs analysis; it is sufficient for the Commission to ensure that the dial-around rate is in the "zone of reasonableness".[4] The proper role of

(Footnote continued)
Northern, Inc. v. United States, 555 F.2d 637, 641-43 (8th Cir. 1977). In the payphone context, which is not subject to a "just and reasonable" carrier-oriented standard, and which the Commission has reasonably found to be workably competitive, the use of "marketplace analogies" such as those employed in the jukebox case is clearly more appropriate than an attempt to base compensation on the dynamic and difficult-to-assess cost factors characteristic of a highly competitive marketplace.

3 In the event that market price indicators change, carriers can be counted on to promptly bring the matter to the FCC's attention.

4 There should be a bias toward setting the compensation rate at the high end of the zone. The worst consequence of setting a rate too high is that there will be an oversupply of payphones until corrective measures take effect. See discussion following this note.

costs in this proceeding is to validate the Commission's market-based rate prescription - i.e., to give rough assurance that a market-based rate is not too far off the mark.

Another reason for avoiding reliance on costs is that cost allocations are inherently highly subjective. This is particularly true with respect to payphones. Even where it is possible to isolate the costs of an enterprise that are attributable to payphone operations, the question of which payphone costs are allocable to particular categories of payphone calls may be highly controversial. See Section I.C. below. And, if the Commission establishes a "cost-based" compensation rate that is too low, the market will not automatically correct the rate. Payphone providers will exit the market, and deployment of payphones will decreased, contrary to the fundamental purpose of section 226.

Furthermore, it is not clear what a cost allocation would prove. Although carriers have strenuously argued that local coin calls cost more than dial-around calls, local coin calls are not the only possible market price surrogate. Another reasonable surrogate, 0+ commissions, relates to calls that are likely to have fewer attributable costs than dial-around calls. [5]

In summary, the Commission should continue to follow the basic approach set forth in its earlier orders. The "increasingly competitive" payphone marketplace "is best able to set the appropriate price for payphone calls in the long-term." Payphone Order,

[5] The per-call cost of collecting dial-around compensation is higher than the per-call cost of collecting 0+ commissions, because 0+ commissions involve a transaction with only a single "friendly" carrier while dial-around compensation involves transactions with numerous "unfriendly" carriers.

¶ 70. The Commission should look to the market indicators set in this payphone marketplace as its primary source of guidance in setting the default rate for dial-around calls.

B. The Commission Should Consider Other Relevant Market-Based Surrogates

The deregulated local coin rate is only one of several market rates that are available as potential surrogates to approximate the market price of using a payphone. Further, the deregulated local coin rate level of 35 cents estimated by the Commission is at the low end of the range of credible surrogates regarding the market price of a payphone call.[6] As shown below, the record indicates that other surrogate levels are ***substantially higher***.

1. 0+ commission levels

0+ commission levels are a logical indicator of the market price of the opportunity to receive calls from a payphone. They are the only known instance where carriers and payphone providers meet in the marketplace to negotiate a price for the routing of calls from the payphone to the carrier. As such, 0+ commission levels can be considered a reasonable approximation of the price that would be agreed upon if it were possible to have free negotiations over the price for routing "dial-around" calls.

In CC Docket No. 91-35 the Commission expressly recognized that it is a "reasonable approach" to base dial-around compensation on AT&T 0+ commissions.

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[6] The Court decision did not disturb the FCC's finding that deregulated local coin rates generally have settled at the level of 35 cents.

Policies and Rules Concerning Operator Service Access and Payphone Compensation, Second Report and Order, 7 FCC Rcd 3251, 3257 (1992). In the Report and Order, in this proceeding, however, the Commission rejected the use of 0+ commission levels on the ground that:

> use of 0+ commission data would tend to overcompensate PSPs, because these commissions may include compensation for factors other than the use of the payphone, such as a PSP's promotion of the OSP through placards on the payphone.

Report and Order, ¶ 69. The Commission should reconsider its rejection of 0+ commission data. The Commission has not explained why it has summarily rejected 0+ commissions as a benchmark, after it previously relied on 0+ commission levels for the same purpose. There is no reason to believe that the commission level includes any substantial element of compensation for "placard" promotion, especially in the case of a carrier such as AT&T, which massively employs numerous other methods of promoting its operator services. See APCC's 1996 Comments at 8-9.[7]

The data submitted in 1996 by APCC showed that AT&T's average commission levels -- which historically have been lower on a per-call basis than other IXCs -- ranged

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[7] As the cited pages illustrate, AT&T is now promoting access to its operator services primarily through 1-800 dialing. Thus, there is little reason to believe that AT&T derives substantial value from placard promotion. Thus, AT&T's 0+ commissions clearly are payments for call origination, not carrier promotion. See also Illinois Public Telecommunications Association (IPTA) 1996 Comments at 13 (noting that, in the Illinois Commerce Commission's dial-around proceeding Sprint's witness stated that the dial-around rate should be 2% less than the market rate of 0+ commissions). Reducing AT&T's 0+ commissions of 22-30% (APCC 1996 Comments at 32) by 2% results in a dial-around rate of 40-75 cents per call.

from 45 cents to 80 cents per call. APCC 1996 Comments at 32.[8] The middle of this range is 62.5 cents per call.

2. 0- Transfer Rates

0- transfer rates, while not as close surrogates as 0+ commissions, are a reasonable surrogate for dial-around compensation because they indicate the minimum price that IXCs are willing to pay to obtain telephone traffic. Policies and Rules Concerning Operator Service Access and Payphone Compensation, Second Report and Order, 7 FCC Rcd 3251, 3257 (1992). Current record evidence provided by the RBOC Coalition indicates that the average price of a 0- transfer call (adjusted for the presence of unanswered calls) is 42-49 cents per call. APCC has recently surveyed seven of the top eight LECs, and determined that their average unadjusted 0- transfer rate is 31 cents per call.[9] When adjusted for unanswered calls (using the RBOC Coalition's factors which average about 75%), the average price of a completed 0- transfer call is 41 cents per call.

3. Sent-paid toll call surcharges

Another reasonable indicator of the market price of using a payphone is the surcharge applied by a payphone provider for sent-paid toll calls. This represents the amount, over and above the standard transmission charge, that a payphone provider

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8 The RBOC Coalition estimated a somewhat higher range of AT&T commissions, from 60 cents to $1.00 per call. IPTA estimated commission levels for MCI, Ameritech and other OSPs to be $0.48-$0.60 per call. IPTA 1996 Comments at 12.

9 The rates are: Ameritech, 28 cents; Bell Atlantic, 28 cents; BellSouth, 35 cents; NYNEX, 30 cents; Pacific Bell, 30 cents; Southwestern Bell, 28.2 cents; and GTE, 35 cents. Data for US West was unavailable. See Attachment 1.

charges for the convenience of making a toll call from a payphone. APCC's review of AT&T and LEC tariffed charges indicated that sent-paid surcharges can range from $0.75 - $2.05 per call. See APCC 1996 Comments, Attachment 3. See also IPTA 1996 Comments at 12 ($0/95 per call). The middle of this range is $1.40 per call.

* * *

While 0- transfer rates provide a relevant surrogate, the more appropriate market-based surrogates are local coin calls, operator assisted call commissions, and sent-paid toll surcharges, because these three surrogates are based on prices actually charged in the marketplace for origination of calls from payphones. The simple average of these three surrogates is about 80 cents per call. A weighted average based on average numbers of each type of call is roughly 45 cents per call.[10]

While APCC believes a market-based approach justifies setting a uniform dial-around compensation rate at roughly the 45-cent level, it is also reasonable for the Commission, in order to promote economic efficiency and avoid the need to revisit the rate, to set the default dial-around compensation rate equal to the local calling rate at each payphone, as it did in the previous phase of this proceeding.

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10 APCC's 1996 survey shows payphones averaging 24 0+ calls per month and 511 coin calls per month. Attachment 4. It is reasonable to estimate that coin calls are 90% local (460 calls) and 10% toll (51 calls). ((24 x $.625) + (460 x $.35) + (51 x $1.40)) ÷ (24 + 460 + 51) = $.46.

C. If The Local Coin Calling Rate Is Used, No Significant Adjustments For "Cost Differences" Are Required

As discussed above, the FCC can legitimately continue to rely on market-based indicators, including but not necessarily limited to the local coin rate, to set the dial-around rate. Further, the Commission can justify using these market indicators to set the dial-around compensation rate without making a finding that the costs of the various types of calls are the same. However, in the event that the FCC concludes it should evaluate whether there are variations in the cost attributable to various types of calls, the discussion below demonstrates that the cost differences, if any, between local coin calls and dial-around calls are minimal.

1. Fixed payphone costs should not be assigned to a particular class of payphone calls

The record demonstrates indisputably that most payphone costs, including the costs of purchasing, installing and maintaining equipment, are relatively fixed, and will be incurred regardless of short-term variations in the volume of calls. See, e.g., Strategic Policy Research, Economic Report on FCC Resolution of Payphone Regulatory Issues, at 33, attached to BellSouth's 1996 Comments ("Compensation arrangements *must* recover *more* than merely the comparative small costs incurred when a particular call is placed"). For example, monthly charges for subscribing to local exchange lines must be incurred regardless of the number of coin or dial-around calls made from a payphone. Similarly, payphone equipment costs -- including coin and coinless calling capabilities -- must be incurred in order to have a payphone at all.